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Office of Administrative Law Judges
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In the Matter of:

SAM L. DUNCAN,

Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Self-Insured Employer

Case No.: 2000-LHC-2731
OWCP No.: 5-87725

Appearances:

John H. Klein, Esq.
Montagna, Klein & Camden
For the Claimant

Christopher R. Hedrick, Esq.
Mason, Cowardin & Mason
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This proceeding arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended ("LHWCA" or the "Act"), 33 U.S.C. § 901, *et seq.*, and the implementing regulations found at 20 CFR Part 702. Section 3 of the Act provides that compensation shall be payable to an employee for a disability or death that resulted from an injury occurring upon the navigable waters of the United States, including any adjoining wharf, pier, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, dismantling, or building of a vessel. *See* 33 U.S.C. § 903. The general purpose of the Act is to aid longshoremen by minimizing the need for litigation to secure compensation for their injuries. *See Reed v. S. S. Yaka*, 373 U.S. 410, 415 (1963); *Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S.

596, 616-17 (1981). Moreover, the Act is designed to ensure that covered workers are fairly and promptly compensated for claims arising out of their employment. *See Marsala v. Triple A South*, 14 BRBS 39, 43 (1981) (fundamental intent of the Act is to compensate employees for loss of wage-earning capacity attributable to employment-related injury).

Sam L. Duncan ("Claimant"), filed a claim against Newport News Shipbuilding and Dry Dock Company ("Employer") seeking permanent total disability, or in the alternative, temporary total disability from September 10, 1999 to March 23, 2000, as a result of a right knee injury incurred in January 1993.[1] The Employer controverted stating that the Claimant had a wage earning capacity and argues that the claimant did not diligently search for alternate suitable employment. A hearing regarding this matter was held in Newport News, Virginia, on April 3, 2001. All parties were given a full opportunity to present evidence and argument pursuant to the Act and its accompanying regulations and the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Claimant submitted exhibits ("CX") 1-3, and the Employer submitted exhibits ("EX") 1-4. All of these exhibits were accepted into the record at the hearing.

Upon conclusion of the hearing, the record remained open for the submission of written closing arguments, which were received by the court from both parties. This decision is being rendered after giving full consideration to the entire record.

STATEMENT OF THE CASE

Claimant was employed with the Employer for approximately 19 years and worked as a paint inspector. She is seeking temporary total disability from the Employer for an injury that occurred in January 1993. In January 1993, the Claimant twisted her knee while climbing into a ship. Her treating orthopedic surgeon, Dr. Traynham, gave her a 30 percent permanent impairment of the right leg. Dr. Traynham assigned the Claimant permanent work restrictions, which included no squatting, climbing, or kneeling, and a 40-pound lifting restriction. Thereafter the Employer assigned the Claimant to work within her restrictions.

In April 1999 through September 1, 1999, Claimant participated in a work strike. Upon returning to work with the Employer on September 1, 1999, Claimant was assigned to light duty within her work restrictions. Claimant worked for the Employer approximately eight days and was laid off at the Employer's request. The Claimant was unemployed from the time of her layoff into March 2000. On March 23, 2000, she secured a position as a bartender for Gloucester Moose Lodge. Claimant is seeking total disability compensation for the time period between September 10, 1999 and March 23, 2000, when she found alternate employment. The Employer argues that there was suitable alternative employment for the Claimant during the time period between September 10, 1999 and March 23, 2000, and that the Claimant was not diligent in finding such employment. Claimant responds that the

[1]The claim for permanent total disability was dropped after the Claimant obtained alternate employment. *See* the Claimant's post-hearing brief.

Employer failed to prove that suitable alternative employment existed during the entire time period of her lay off, and that she made a reasonable and diligent search for suitable alternate employment.

ISSUES

The parties agreed that the Claimant cannot return to work as a paint inspector. The issues remaining are:

1. Whether the Employer satisfied its burden of proof that there was suitable alternate employment within the Claimant's work restrictions and reasonably available to the Claimant during the time period that the she was unemployed from September 10, 1999, to March 23, 2000?

2. If the Employer has demonstrated that there was suitable alternate employment reasonably available to the Claimant, did the Claimant make a diligent search for such employment to entitle her to total disability benefits?

Transcript ("Tr.") at 6; post-hearing briefs.

APPLICABLE STANDARDS

Claims brought under the Act are subject to a burden-shifting proof scheme. The Claimant bears the initial burden of establishing a prima facie case of disability. An employee may establish a prima facie case of disability by demonstrating that she is unable to return to her usual employment due to a work related injury. If this is established, then the burden shifts to the Employer to show the availability of suitable alternate employment within the geographic area where the claimant resides. The employer can make such a showing by itself providing suitable alternative employment to the employee, as occurred in this case until the layoff; or by demonstrating that suitable alternative employment is available in the relevant labor market. The claimant may then counter this showing by demonstrating a diligent but unsuccessful search for such employment. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 800-801 (4th Cir. 1999). After review of the record before me, I find that the Claimant has established a prima facie case of total disability. I also find that the Employer has established that suitable alternate employment was available to the Claimant during the time of her layoff. However, the Claimant has demonstrated that she made a diligent effort to find suitable alternate employment, and her efforts were unsuccessful until March 23, 2000 when she found such employment. I will briefly summarize the evidence before me and discuss each party's burden respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

Stipulations

The parties were able to reach the following Stipulations:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*.

2. An employer-employee relationship existed.

3. On January 29, 1993, the claimant sustained an injury to her right knee arising out of and in the course of her employment.

4. A timely notice of the injury was given by the employee to the employer.

5. A timely claim for compensation was filed by the employee.

6. The employer filed a timely First Report of Injury with the Department of Labor and a timely notice of controversion.

7. The average weekly wage was $622.59 yielding a temporary total compensation rate of $415.06.

8. The claimant has been paid for a 30 percent permanent partial disability rating of the leg on September 30, 1993.

9. The claimant had permanent work restrictions and she was laid off by the employer on September 9, 1999.

10. The claimant found suitable alternate employment on March 23, 2000.

Tr. at 5.

These stipulations have been admitted into evidence and are therefore binding upon the Claimant and Employer. *See* 20 C.F.R. § 18.51; *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is presented here. I have carefully reviewed the foregoing stipulations and find that they are reasonable in light of the evidence in the record. As such, the same are hereby accepted as findings of fact and conclusions of

law.

The Claimant's Evidence

On direct examination, Claimant testified that she worked for the Employer between the years of 1980 to September 9, 1999, at which time the Employer laid her off. Claimant was a paint inspector and in January 1993 injured her right knee. As a result of her injury, Claimant underwent surgery of her right knee, was given a 30 percent permanent partial disability rating, and was assigned permanent work restrictions by Dr. Traynham. *See* EX 3 and 4. Notwithstanding her injury, Claimant testified that she remained in the same position with the Employer up until the time she participated in a worker's strike in April 1999.

Claimant participated in a strike from April 5, 1999 through September 1, 1999. Upon returning to work on September 1, 1999, the Employer assigned Claimant to work within her restrictions. Thereafter, the Claimant worked for the Employer for eight days and was laid off at the Employer's request. With the exception of temporary employment during the summer of 2000, Claimant was unemployed from the time of her lay off up until March 23, 2000.

Between September 9, 1999 and March 23, 2000, Claimant testified that she attempted to find suitable alternate employment within her work restrictions. Her attempts included resources such as newspaper advertisements, contacting different employers by making "cold calls" and "walk-ins," and utilizing different organizations such as the United Way, Goodwill, the Virginia Rehabilitation Department, the Virginia Employment Commission, and Concentra Managed Care. By letter dated October 25, 1999, Claimant was notified by Concentra Managed Care that it offered a Job Club program. Claimant attended most of the classes and contacted several of the job leads that were provided to her by Concentra and the Department of Rehabilitative Services. The few leads that Claimant did not contact was due to her lack of transportation. Additionally, Claimant testified that she did not receive any leads or contacts from the Virginia Employment Commission. The Claimant submitted lists of employers that she had applied to since September 9, 1999, CX 1 and 2, and a vocational evaluation completed by the Virginia Department of Rehabilitative Services, CX 3. After an initial interview on November 30, 1999, the vocational evaluation took place in January 2000. In her report, the Evaluator observed that the Claimant "worked diligently throughout the evaluation" and "held a high level of interest throughout the entire process."

Claimant testified that her car was in need of repair and resulted in her inability to attend some of the Job Club classes, as well as her inability to follow up on job leads. She notified Concentra of the difficulties she was having with transportation, however, was not offered alternative transportation to the potential employers. Consequently, Claimant was only able to travel some distances. She was unable to follow up on job leads that were in the Norfolk/Virginia Beach/Chesapeake area. Claimant further testified that she was not able to continue with the Job Club program because it became a great financial strain on her. She was not receiving any worker's compensation benefits and could not afford the gas to attend the classes or to follow up on the jobs leads. Moreover, she stated that Concentra would only reimburse her for mileage, but could not give her any money in advance. Finally, through

the Virginia Department of Rehabilitative Services, Claimant was able to make the repairs to her vehicle in January 2000, which totaled $2,500.

Claimant secured a job as a bartender at the Gloucester Moose Lodge on March 23, 2000. She stated that she found that position through a newspaper advertisement and was able to get a referral to the board through a friend who was a member of the Lodge. Claimant earns $5 per hour plus tips. Her duties include cleaning the bar and stocking 6-packs of beer in a cooler. On average, she works 32 hours per week. Claimant stated that she is making less working at the Lodge than she made while working for the Employer.

On cross examination, Claimant testified that she worked for other employers prior to her employment with the Gloucester Moose Lodge. During the strike in the summer of 1999[2], she worked as a waitress, part-time, for Joe and Mima's Restaurant. Claimant earned $2.14 per hour, plus tips. She quit her job at the restaurant because she was subjected to sexually oriented behavior by the cook. Although Claimant testified that she could have returned to Joe and Mima's Restaurant, and later applied for two waitress positions, at TGIF and Obelisk, she also said that waitressing is heavy, quick work and her leg would not stand it. Claimant stated that she did not attempt to locate jobs as a cashier because she was unable to perform that type of work, which usually required a lot of squatting, kneeling, stocking, and standing in one place. Additionally, Claimant testified that, for the most part, her job search consisted of jobs that paid over the minimum wage.

Claimant also testified on cross-examination that she was informed about her lay-off with the Employer within the first couple of days of her return from the strike. Notwithstanding this knowledge, Claimant did not start her job search until September 20, approximately 3 weeks after being informed of the lay-off.

The Employer's Evidence

The Employer introduced exhibits pertaining to a labor market survey conducted by Ms. Denise Barnhart, EX 1, the Claimant's participation in the Job Club, EX 2, some treatment records, EX 3, and a work restrictions evaluation by Dr. Traynham dated September 30, 1993, EX 4.

On direct examination, Ms. Barnhart testified that she is currently a Vocational Case Manager with GENEX Services. During the hearing, Ms. Barnhart was offered as an expert witness in the field of vocational rehabilitation. She has a Bachelor's degree in sociology, 13 years of experience in the field of vocational rehabilitation, been a certified as a rehabilitation provider for the State of Virginia for 4 years, has 4 years of experience as a job placement specialist with the Department of Labor, and has been a certified rehabilitation provider with the Department of Labor for 3 months. During September

[2]In his question, counsel for the Employer referred to the "the period of the strike . . . the summer of 2000." Tr. at 22. The record is clear, however, that the strike occurred during the summer of 1999.

9, 1999 through March 23, 2000, she was employed by Concentra Managed Care as a Vocational Case Manager/Job Club Manager. In her capacity as a Vocational Case Manager for Concentra, Ms. Barnhart conducted one-on-one vocational case management evaluations and coordinated the Job Club daily sessions.

Ms. Barnhart stated that the Job Club is a 4-week or a 20-day program. She testified that participants in the Job Club learn employment seeking skills during the first 2 weeks of the program. They learn how to look for employment, write resumes and participate in mock interviews. In developing a resume, the Job Club assist the participants in identifying skills that are transferrable to fit new positions within their physical restrictions. The individuals are also taught to locate potential employers through networking and cold calling. Ms. Barnhart stated that in her opinion these are the best method in searching for a job because the competition for a particular position is reduced. She does not consider newspaper advertisements to be a good source because there is a greater number of applicants applying for a specific position. Additionally, individuals in the Job Club program participate in the Career Ability Placement Survey (CAPS) and take a Wide Range Achievement Test (WRAT), which test the individual's reading, writing, spelling, and mathematical ability. During the last two weeks of the program, participants are given job leads and are required to follow-up on those leads.

Ms. Barnhart testified that the Claimant participated in the Job Club program and obtained a high score on the WRAT test. She stated that the Claimant's reading ability was at a post-high school level and her spelling and mathematical ability was at a high school grade level. The Claimant also received a high score on the CAPS survey. Ms. Barnhart stated that out of the 14 categories of employment, the Claimant would be able to perform 11 or 12 of the categories of employment without additional training.

In December 1999 through January 2000, Ms. Barnhart conducted a labor market survey for the Claimant. Notwithstanding the period that the survey was conducted, Ms. Barnhart testified that she considers the survey valid for the time period of this claim (September 10, 1999 through March 23, 2000). She stated that the first step in conducting the labor market the survey, is to determine what the Claimant's physical restrictions were and the areas of employment that the claimant could successfully perform. Once that was established, she made cold calls to different employers and inquired whether they are currently hiring, whether they recently hired someone, and whether they anticipated any job openings. In this case, Ms. Barnhart stated that the Claimant's physical restrictions were no squatting, climbing, kneeling, and a 40-pound lifting maximum. She testified that the jobs that were in the Claimant's restrictions were dispatching positions, receptionist, various driving positions, and cashiering positions. Ms. Barnhart identified 29 positions in her labor market survey, all of which were in the Claimant's work restrictions and had positions available or recently hired someone. *See* EX 1. In her opinion, the most readily available job classification in the Commonwealth of Virginia was cashiering. She testified that the Claimant had a wage-earning capacity of approximately $206 to $358 a week between September 9, 1999 and March 23, 2000.

On cross examination, Ms. Barnhart testified that she was a salaried employee of Concentra, the employer referred the Claimant to Concentra's Job Club program, and that the employer requested

a labor market survey for the Claimant. In her testimony, Ms. Barnhart stated that the Claimant was not made aware of some of the potential employers that were listed in the labor market survey. The Claimant was not notified of these positions because they were discovered when the survey was being conducted. These jobs were included in the survey to establish that there were positions available in a particular employment category for a specified period of time. Ms. Barnhart also stated that the Claimant was not provided with a copy of the labor market survey. However, the Claimant was made aware of those employers that were listed in both the survey and the Job Club records. Notwithstanding this fact, she testified that the her supervisor noted in the Claimant's record that the Claimant reported a delay in her ability to follow up some of the leads.

Claimant's file at the Job Club was closed on December 20, 1999 and the Claimant was re-referred by the Employer in January 2000. During the period that the Claimant's file was closed, the Claimant was not provided with any job leads. Additionally, the Claimant's file was closed again on January 18, 2000 because she failed to attend any sessions after January 10, and the Claimant was not provided with any leads after that date.

Discussion

In this claim, the Claimant twisted her right knee while climbing a ladder into a ship at her place of employment on January 29, 1993. The parties have stipulated that the injury to her right knee arose out of and in the course of her employment. The Claimant was examined by Dr. Traynham, who gave her a 30 percent permanent impairment of the right leg. Dr. Traynham also assigned the Claimant permanent work restrictions that included no squatting, climbing, or kneeling, and a 40-pound lifting restriction. EX 3 and 4. Given these restrictions, the Claimant could not perform her duties as a paint inspector. Claimant was reassigned to work within her restrictions, and was later laid off by the Employer. Based on these uncontested facts, I find that the Claimant has satisfied her burden of showing a prima facie case of disability within the meaning of the Act. Accordingly, the issues before me now are (1) whether suitable alternate employment existed during the time period that the Claimant was unemployed, and if so, (2) whether the Claimant made a diligent search for such employment. To satisfy its burden, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering her age, background, employment history and experience, and intellectual and physical capabilities. *See v. Washington Metropolitan Area Transit Authority,* 36 F.3d 375, 380 (4th Cir. 1994). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if she shows she diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The claimant's diligence is relevant only after the employer satisfies its burden of establishing the availability of suitable alternate employment. *Roger's Terminal*, 784 F.2d at 691.

Suitable Alternate Employment

In this claim, the Employer offered a labor market survey conducted by Ms. Barnhart, a former

Vocational Case Manager for Concentra Managed Care, to establish the existence of suitable alternative employment that was reasonably available to the Claimant during the time period of her layoff. The survey was conducted between December 1999 and January 2000. Ms. Barnhart, however, testified that the survey is valid for the time period of September 9, 1999 through March 23, 2000. *See* Tr. at 35. In compiling the survey, Ms. Barnhart first determined areas of employment that was suitable for the Claimant. She considered the Claimant's work restrictions, education level, prior work experience, and performance on various exams. *See* Tr. at 36. The survey identified 29 positions that were within the Claimant's work restrictions. These employment areas included dispatching positions, receptionists, various driving positions, and cashiering position. Moreover, once the employment areas were determined, Ms. Barnhart made "cold calls" to various employers and inquired into their current availability, whether they made recent hires, and whether they anticipate future job openings. Claimant argues that the labor market survey does not satisfy the Employer's burden because the jobs listed in the survey were not recent and Ms. Barnhart did not verify that the various employers had positions available during the entire period of the Claimant's unemployment. Moreover, Claimant contends that the labor market survey is invalid because Ms. Barnhart did not verify the requirements and conditions of each job.

It has been held that the labor market survey need not cover the entire period of Claimant's unemployment. The Employer may satisfy its burden of showing available alternate employment by presenting evidence of jobs, which, although no longer open when located, were available during the time the Claimant was able to work. *See Tann*, 841 F.2d at 543. Additionally, there is no requirement that the vocational expert must actually contact potential employers to inquire whether they would hire someone of the claimant's general age, background, and disability, or convey information about job openings to the claimant. *Ibid.* The Employer only needs to take into consideration the specific capabilities of the Claimant when identifying alternate employment. *See Tartan Terminals Inc. v. Puller*, 175 F.3d 1016, 1999 W.L. 235894, at *3 (4th Cir. Apr. 22, 1999) (unpublished opinion). The purpose of the vocational expert's survey is not to find a job for the claimant, but to see whether suitable work is available for which the claimant could compete realistically. *See Tann*, above. I conclude, therefore, that the Employer's labor market survey does not need to list available jobs for the entire period of Claimant's unemployment.

The Claimant argues that the Employer failed to establish suitable alternate employment because the majority of the jobs listed in the labor market survey were not in the Claimant's local community. Claimant states that the employers located in the Norfolk and Virginia Beach area are 40 miles away and are not considered within the local community of the Claimant. In order for jobs to qualify as suitable alternate employment, they need to be reasonably available in the local or surrounding community. *See Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001). The Fourth Circuit has held that the relevant labor market in which the existence of a suitable job is available to the claimant is in the community in which [s]he lives. *See See*, 36 F.3d at 381. In this claim, Claimant testified that she resides in Yorktown, Virginia and worked for the. Employer in Newport News, Virginia. The Employer is located approximately 20 miles from Claimant's home

address.[3] The Board has held, however, that jobs 65 and 200 miles away are not within the geographical area, even if the employee took such jobs before his injury. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114, 117-119 (1977), aff'd sub nom. *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978). According to the Claimant, she was having transportation difficulties and was not able to follow up on all the job leads that were provided to her by Concentra. She stated that she was able to follow up on those leads that were in the Newport News area. However, if those leads were across the tunnel in the Norfolk, Virginia Beach or Chesapeake area, she was not able to apply to those jobs because of her lack of transportation. *See* Tr. at 18. Her Concentra rehabilitation plan identified her labor market as Newport News, Williamsburg and Hampton. EX 2ddd. I find that the jobs located in the Norfolk, Virginia Beach, or Chesapeake area are not within the Claimant's local community.

Notwithstanding the fact that some of the jobs contained in the labor market survey are outside of the Claimant's local community, the Employer has located at least nineteen jobs that are within the Claimant's work restrictions and are located in Claimant's surrounding community. Having found that the Employer's labor market survey need not provide a list of jobs that were available during the entire period of Claimant's unemployment, I now find that the jobs in the labor market survey that are within the Claimant's local community satisfy the Employer's burden, and the burden now shifts to the Claimant to show that she made a diligent search for such employment.

Diligent Search for Employment

Once the Employer has satisfied its burden, the Claimant then bears a complementary burden. *See Tann*, 841 F.2d at 542; *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981). The Claimant may retain total disability benefits by rebutting the Employer's showing of suitable alternate employment. She must demonstrate that she diligently tried but was unable to secure such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2nd Cir. 1991). The burden placed on the Claimant does not alter the statutory presumption of coverage, nor does it displace the Employer's initial burden of demonstrating job availability. *See Trans-State Dredging v. BRB*, 731 F.2d 199, 202 (4th Cir. 1984); *Roger's Terminal and Shipping Corp.*, 784 F.2d at 691. The Claimant need not show that she attempted to get the identical jobs the Employer showed were available. She only needs to establish that she was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the Employer to be reasonably attainable and available." *See Trans-State Dredging v. BRB*, 731 F.2d at 202; *Palombo*, 937 F.2d at 74 (citing *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1043). Allowing the Claimant the opportunity to prevail by showing she diligently sought but was unable to secure another job is in accord with the remedial goals of the LHWCA. *See Palombo*, 937 F.2d at 73.

In this claim, the Employer argues that the Claimant did not make a diligent search for suitable

[3]Pursuant to the Federal Rules of Evidence, Rules 201 and 803(17), I take judicial notice of http://www.mapquest.com/directions.

alternate employment because she did not follow up on all the job leads that were provided to her, limited her job search to jobs that payed above the minimum wage, and refused to return to her previous waitress job. Moreover, the Employer argues that the Claimant made minimal effort in vocational rehabilitation, which is evidenced by her continued absences in the Job Club program and, contrary to what she was taught, relied primarily on newspaper advertisements for job leads. On the contrary, the Claimant states that she satisfied her burden of diligently searching for alternate employment because she made efforts to attend the Job Club program and follow up on job leads when transportation was available to her. Moreover, the Claimant states that her efforts in finding a job ranged from newspaper advertisements, cold calls, participating in adult education classes and other vocational rehabilitation organizations. She identified 27 places of employment where she sought work over the six month period between September 20, 1999, and March 23, 2000. CX 1 and 2.

I find that the Claimant has made a diligent effort in finding suitable alternative employment during her layoff period. The Employer, through its exhibits, identifies several job leads that were provided to the Claimant. *See* EX 2. According to the records from Concentra, the Claimant followed up on some but not all leads. EX 2k, 2l. In particular, the Employer submitted six Job Search Verification Forms, which identify whether the Claimant applied to particular jobs. *See* EX 2a, 2m, 2n, 2r, 2s, and 2t. Three indicated that the Claimant applied or would be considered for an interview, and three indicated she did not apply, or there was no record of her applying. Based on the record, I find that the Claimant made a reasonable effort to follow up on the job leads provided by Concentra. Moreover, the Claimant need not show that she attempted to get the identical jobs the Employer showed were available. She only needs to establish that she was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the Employer to be reasonably attainable and available." *See Palombo*, 937 F.2d at 74. The Claimant utilized other programs in aiding her search for alternate employment. According to the Claimant, she attended Adult Education Classes at Warwick High School, attended counseling sessions at Work Place Express and special programs sponsored by Tidewater Community Rehabilitation Center, made cold calls to various employers, as well as seeking assistance from Goodwill, the United Way, the Virginia Department of Rehabilitative Services, and the Virginia Employment Commission. *See* Tr. at 16; CX 3.

The Employer also argues that the Claimant made a minimal effort in vocational rehabilitation because of her continued absences in the Job Club program. Several letters were mailed to the Claimant notifying her that her absences in the Job Club program may adversely affect her ability in procuring gainful employment. *See* EX 2. Notwithstanding those absences, I find that the Claimant made a reasonable effort in vocational rehabilitation. According to the Job Club Activity Reports, the Claimant attended most of the Club sessions, including 15 out of 20 sessions by December 14, 1999. *See* EX 2k, 2l, 2r, 2ee, 2qq, 2zz. Claimant explained that she was not able to fully participate in the Job Club program because during October 1999 through January 2000 she was having transportation difficulties. The letters, submitted by the Employer, all correspond with dates that the Claimant testified as to having transportation difficulties. Ms. Barnhart also testified that the Job Club records contained a note from her supervisor indicating that the Claimant was going to have a delay in following up on the job leads provided to her. *See* Tr. at 52. Additionally, the letter dated November 23, 1999 indicates that other arrangements were made in lieu of the Claimant's attendance at the Job Club program. *See*

EX 2w. Although she did not attend the Job Club in January 2000, she did undergo evaluation at the Virginia Department of Rehabilitative Services that month. CX 3. It is well established that an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences from the evidence. *Wenciler v. American National Red Cross*, 23 BRBS 408, 412 (1990). In light of the foregoing facts, I find that the Claimant's testimony of having transportation difficulties is credible and the Claimant made a reasonable effort to participate in the Job Club program.

Finally, the Employer argues that the Claimant's search for alternate employment was not diligent because she refused to return to her previous waitress job and limited her job search to those jobs that payed above a minimum wage. The Claimant testified that she quit her previous waitress job because her legs could not handle the stress of the job and she was subjected to sexually harassing behavior. *See* Tr. at 25 and 29. In determining the facts, the adjudicator operates under the statutory policy of resolving all doubtful fact questions in favor of the injured employee. *See Strachan Shipping Co. v. Shea*, 406 F.2d 521, 522 (5th Cir.) (per curiam), *cert. denied*, 395 U.S. 921 (l969). Moreover, it has been held that a job is not suitable alternate employment where the Claimant performs this job under considerable pain and discomfort. *See Newport News Shipbuilding & Drydock Co. v. Wiggins*, 2001 WL 1598094, * 3 (4th Cir. Dec. 14, 2001) (unpublished opinion). I find that the Claimant's previous waitress job was not suitable alternate employment and her failure to seek to return to that job does not mean she failed to show diligence in finding alternate employment.

Nor do I accept the Employer's argument that the Claimant's efforts in finding alternate employment were deficient because she focused on jobs that paid over a minimum wage. This case is distinguishable from a recent case denying benefits to another claimant on the basis that he did not apply to minimum wage jobs. *See In the Matter of Sweeney v. Newport News Shipbuilding & Dry Dock Co.*, 1999-LHC-2783, 1999-LHC-2784 (ALJ July 19, 2000).[4] In *Sweeney*, the ALJ noted that the claimant did not conduct any job search and admitted knowing that were appropriate minimum wage jobs available, but refused to consider them. Unlike Sweeney, the Claimant in this case conducted a job search and attempted vocational rehabilitation. The Claimant testified that some of the jobs that she applied for did pay a minimum wage. *See* Tr. at 24.

Conclusion

I find that the Claimant has established a prima facie case of total disability. I also find that the Employer has established that suitable alternate employment was available to the Claimant during the time of her layoff. However, the Claimant has demonstrated that she made a diligent effort to find suitable alternate employment, and her efforts were unsuccessful until March 23, 2000 when she found such employment. She is entitled to compensation for temporary total disability for the period from September 1, 1999, to March 23, 2000, at the rate of $415.06 per week in accordance with the stipulation of the parties.

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[4]This decision is published on the Department of Labor's website at www.oalj.dol.gov.

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734, 735 (1978). The rate should be determined in accordance with the rate employed by the U.S. district courts under 28 U.S.C. §1961. *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

ATTORNEY FEES

Section 28 of the Act, 33 U.S.C. § 928, and 20 C.F.R. § 702.123 provide for an award of attorney fees when a claimant utilizing counsel is successful in pursuing her claim. Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty days (30) days to file an itemized application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten (10) days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

It is hereby ORDERED:

1. The Employer shall pay temporary total disability compensation to the Claimant in the amount of $415.06 per week for the period from September 10, 1999, to March 23, 2000, plus interest. The District Director shall calculate the dollar amounts for compensation and interest.

2. Claimant's attorney shall file an itemized application for fees for services before the Administrative Law Judge within 30 days of the date of this order; the parties shall have 10 days thereafter to respond.

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ALICE M. CRAFT
Administrative Law Judge